

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EL PAPEL LLC, *et al.*,

Plaintiffs,

v.

JENNY A. DURKAN, *et al.*,

Defendants.

CASE NO. 2:20-cv-01323-RAJ-JRC

REPORT AND RECOMMENDATION

NOTED FOR: October 1, 2021

The District Court has referred this matter to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), and local Magistrate Judge Rules MJR1, MJR3, and MJR4.

In 2020, in the throes of a worldwide pandemic and corresponding economic downturn, local governments imposed measures including restrictions on landlords' ability to evict tenants for nonpayment and to collect overdue rent. At issue in this lawsuit is the constitutionality of such eviction restrictions imposed by Washington State and the City of Seattle. Two landlords bring suit against the City's Mayor (Jenny Durkan), the City, and the State Attorney General (Robert Ferguson), alleging that the State's moratorium on most residential evictions and the

1 City’s eviction moratorium, rent repayment plan requirement, and additional six-month defense
 2 against eviction¹ violate their civil rights—specifically, their rights to be free from impairment of
 3 contract and from physical takings of their properties.

4 The parties have now filed cross-motions for summary judgment, which are ripe for
 5 decision. Dkts. 93, 103, 104. The parties request oral argument, but oral argument is not
 6 necessary for resolution of the issues presented.

7 This Court—and the District Court—previously found that plaintiffs were unlikely to
 8 succeed on the merits of their claims. *See* Dkt. 78; *see also Apartment Ass’n of L.A. Cty., Inc. v.*
 9 *City of L.A.* (“AALAC”), No. 20-56251, 2021 WL 3745777, at *9 (9th Cir. Aug. 25, 2021)
 10 (citing with approval this Court’s report and recommendation on the preliminary injunction
 11 related to the Contracts Clause issue and the order adopting that report and recommendation).

12 The Court has now taken a hard look at plaintiffs’ renewed arguments, including the
 13 supplemental authority provided by all parties, but finds that plaintiffs have failed to provide
 14 evidence from which a trier of fact could conclude that the restrictions violate the Contracts
 15 Clause or the Takings Clause.

16 Specifically, plaintiffs have failed to provide evidence from which a factfinder would
 17 conclude that the State or City restrictions were not appropriate and reasonable ways to advance
 18 significant and legitimate goals of preventing disease transmission, housing displacement, and
 19 homelessness. And plaintiffs have failed to provide evidence from which a factfinder would
 20

21 ¹ Although the restrictions at issue are three distinct measures enacted by City of Seattle
 22 authorities (including a moratorium on evictions) and one eviction moratorium enacted by the
 23 State, the Court will collectively refer to all measures as “eviction restrictions” in this Report and
 24 Recommendation, for ease of reference. Moreover, the Court will refer to the restrictions
 individually as the “State’s moratorium,” the “City’s moratorium,” the City’s “six month
 defense,” and the City’s “repayment plan requirement.” *See infra*, Background (explaining the
 particulars of each restriction).

1 conclude that a physical taking occurred. Finally, plaintiffs' claims for injunctive relief related
 2 to the State's moratorium are now moot. Therefore, defendants' motions for summary judgment
 3 dismissal should be granted, plaintiffs' summary judgment motion should be denied, and this
 4 matter should be dismissed with prejudice.

6 **BACKGROUND²**

7 **I. The COVID-19 Pandemic**

8 Over the last year and a half, the novel coronavirus ("COVID-19"), first identified as a
 9 cluster of pneumonia cases in late 2019, has grown to a pandemic of unprecedented proportions.
 10 *See Timeline: WHO's COVID-19 Response*, World Health Organization (last visited Sept. 10,
 11 2021).³ On January 21, 2020, Washington State reported the United States' first COVID-19
 12 case. Dkt. 107, at 2. Within approximately a month, officials recognized community spread of
 13 the disease within Washington State, and by the end of February, COVID-19 had claimed its first
 14 victim in Washington State. *See* Dkt. 107, at 3.

15 It is now known that COVID-19 spreads easily from person to person, transmitted
 16 primarily by respiratory droplets or small particles; that the population had little to no pre-
 17 existing immunity to the virus; that pre-symptomatic and asymptomatic infections occur and
 18 cause unknowing spread of the virus; and that the risk of transmission is significantly greater
 19 indoors. Dkt. 107, at 3, 5. Some patients suffer severe or critical illness or even death—and
 20

22 ² Except as otherwise cited, the facts in this section are taken from the parties' evidence
 23 on summary judgment. The Court takes judicial notice of several official sources for various
 background facts.

24 ³ <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#>

1 some survivors appear to experience long-term health complications. Dkt. 107, at 3–4.

2 Outbreaks threaten to overwhelm the healthcare system. Dkt. 107, at 5.

3 Due to the ease of transmission and lack of approved drugs, therapeutics, or vaccines (at
4 the time) to treat or prevent COVID-19 (*see* Dkt. 107, at 6), the COVID-19 outbreak exploded,
5 becoming a leading cause of global death in 2020. *See World Health Statistics 2021*, WHO
6 (2021), at viii (estimating that at least 3 million global excess deaths in 2020 were attributable to
7 COVID-19), 7 (reporting that COVID-19 was one of the top 10 causes of death in the world in
8 2020).⁴

9 Washington State is no exception from the devastation the COVID-19 pandemic has
10 wrought. According to the State Department of Health, at the time of this writing, there have
11 been nearly 600,000 reported COVID-19 cases in Washington State, 32,662 hospitalizations, and
12 6,605 deaths. *COVID-19 Data Dashboard*, Wash. State Dep’t of Health (last visited September
13 10, 2021).⁵

14 **II. Washington State’s COVID-19 Response**

15 On February 29, 2020, the Governor of Washington State declared a State of Emergency.
16 Dkt. 107, at 6. The Governor instituted a number of measures to mitigate the spread and impact
17 of COVID-19 in the State, including prohibiting large or public gatherings and closing schools,
18 colleges, and universities. Dkt. 107, at 6.

19 According to a State epidemiologist, by mid-March 2020—and despite these measures—
20 Washington had the highest absolute number and among the highest number per capita of
21 COVID-19 cases in the country. Dkt. 107, at 7. “From a public health standpoint, [the]

22
23 ⁴ Available at <https://www.who.int/data/gho/publications/world-health-statistics>

24 ⁵ <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard>

transmission rate was unsustainable[.]” Dkt. 107, at 8. Therefore, the Governor issued restrictions including a stay-at-home order, the moratorium at issue in this lawsuit, and, later, a mask mandate for public settings. *See* Dkt. 107, at 9, 12.

The first iteration of the State’s moratorium, Proclamation 20-19, prohibited serving a notice of unlawful detainer for default payment of rent, issuing a 20-day notice of unlawful detainer unless the landlord attested that the action was necessary for health and safety, and initiating judicial actions for writs of restitution for failure to pay rent. *See* Dkt. 106-1, at 6–7.

Throughout 2020, cases continued to ebb and surge, with corresponding implementation, modifications, and pauses of the Governor’s phased reopening plan. *See* Dkt. 107, at 10–14. Although Proclamation 20-19 was set to expire April 17, 2020 (Dkt. 106-1, at 6), the Governor amended and extended the State’s moratorium repeatedly, through June 30, 2021. *See* Dkt. 106, at 6–10.

As amended, the State’s moratorium stated, in pertinent part—

Landlords, property owners, and property managers are prohibited from serving or enforcing, or threatening to serve or enforce, any notice requiring a resident to vacate any dwelling or parcel of land occupied as a dwelling, including but not limited to an eviction notice, notice to pay or vacate, notice of unlawful detainer, notice of termination of rental, or notice to comply or vacate. This prohibition applies to tenancies or other housing arrangements that have expired or that will expire during the effective period of this Proclamation. This prohibition applies unless the landlord, property owner, or property manager (a) attaches an affidavit attesting that the action is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) provides at least 60 days’ written notice of intent to (i) personally occupy the premises as a primary residence, or (ii) sell the property.

[Similar provision applicable to judicial eviction orders or agreements to vacate omitted.]

...

Landlords, property owners, and property managers are prohibited from assessing, or threatening to assess, late fees for the non-payment or late payment of rent or other charges related to a dwelling or parcel of land occupied as a dwelling, and where such non-payment or late payment occurred on or after February 29, 2020[.]

1 ...

2 Except as provided in this paragraph, landlords, property owners, and
 3 property managers are prohibited from treating any unpaid rent or other charges
 4 related to a dwelling or parcel of land occupied as a dwelling as an enforceable debt
 5 or obligation that is owing or collectable, where such non-payment was as a result
 6 of the COVID-19 outbreak and occurred on or after February 29, 2020, and during
 7 the State of Emergency proclaimed in all counties in Washington State. This
 8 includes attempts to collect, or threats to collect, through a collection agency, by
 9 filing an unlawful detainer or other judicial action, withholding any portion of a
 10 security deposit, billing or invoicing, reporting to credit bureaus, or by any other
 11 means. **This prohibition does not apply to a landlord, property owner, or
 12 property manager who demonstrates by a preponderance of the evidence to a
 13 court that the resident was offered, and refused or failed to comply with, a re-
 14 payment plan that was reasonable based on the individual financial, health,
 15 and other circumstances of that resident; failure to provide a reasonable re-
 16 payment plan shall be a defense to any lawsuit or other attempts to collect.**

17 Dkt. 106-1, at 46–47 (bullet points omitted) (emphasis in original). Landlords who violated
 18 these prohibitions faced criminal penalties. Dkt. 106-1, at 48.

19 By early 2021, the State transitioned to a county-by-county phased reopening plan. Dkt.
 20 107, at 16. And in June 30, 2021, corresponding with the end of the State’s moratorium,
 21 Washington State lifted many other COVID-19 restrictions. *See Inslee announces statewide
 22 reopening date of June 30 and short-term statewide move to Phase 3*, Washington Governor Jay
 23 Inslee (May 13, 2021).⁶

24 In the meantime, the State legislature also acted, submitting Engrossed Second Substitute
 Senate Bill (“E2SSB”) 5160 for the Governor’s signature on April 20, 2021. Dkt. 106, at 11. As
 enacted, that bill provides a variety of protections to tenants and ends the eviction moratorium on
 June 30, 2021. *See* Dkt. 106, at 11–12. Among those protections are the creation of an eviction
 resolution pilot program, a right to counsel program, and a rental assistance program in

⁶ <https://www.governor.wa.gov/news-media/inslee-announces-statewide-reopening-date-june-30-and-short-term-statewide-move-phase%C2%A03>.

1 Washington State. *See* Dkt. 126-1, at 23, 25. E2SSB 5160 became effective April 22, 2021.
 2 Dkt. 106, at 11.

3 Between the expiration of the State’s moratorium on June 30, 2021, and the “full
 4 implementation of Senate Bill 5160,” the Governor has passed a “bridge” measure that expires
 5 September 30, 2021. Dkt. 126-1, at 24. Under the bridge measure, eviction is not allowed for
 6 unpaid rent that accrued between February 2020 and July 2021 due to COVID-19, until—

7 both (1) a rental assistance program and an eviction resolution pilot program as
 8 contemplated by Section 7 of E2SSB 5160 have been implemented and are
 9 operational in the county in which the rental property is located; and (2) a tenant
 10 has been provided with, and has, since the effective date of this order, rejected or
 failed to respond within 14 days of receipt of such notice to an opportunity to
 participate in an operational rental assistance program and an operational eviction
 resolution pilot program provided by E2SSB 5160.

11 Dkt. 126-1, at 25. Moreover, such unpaid rent cannot be treated as a currently owing or
 12 collectable, enforceable debt or obligation “where such non-payment was, in whole or in part, a
 13 result of the COVID-19 crisis, until such time as the landlord and tenant have been provided with
 14 an opportunity to resolve nonpayment of rent through a rental assistance program and an eviction
 15 resolution pilot program as provided by Section 7 of E2SSB 5160.” Dkt. 126, at 29.

16 In addition, related to rent that accrues between August 1, 2021, and September 30,
 17 2021—

18 landlords are prohibited from serving or enforcing, or threatening to serve or
 19 enforce, any notice requiring a tenant to vacate any dwelling, including but not
 20 limited to an eviction notice, notice to pay or vacate, unlawful detainer summons
 21 or complaint, notice of termination of rental, or notice to comply or vacate, if,
 22 unless otherwise permitted by this order or under state law, a tenant has (1) made
 full payment of rent; or (2) made a partial payment of rent based on their individual
 economic circumstances as negotiated with the landlord; or (3) has a pending
 application for rental assistance that has not been fully processed; or (4) resides in
 a jurisdiction in which the rental assistance program is anticipating receipt of
 additional rental assistance resources but has not yet started their program or the
 rental assistance program is not yet accepting new applications for assistance.

1 Dkt. 126-1, at 26. Late fees are also disallowed. *See* Dkt. 126-1, at 26. And landlords cannot
 2 evict tenants for unpaid rent from February 29, 2020, through September 30, 2021, “if the
 3 landlord has made no attempt to establish a reasonable repayment plan with the tenant per
 4 E2SSB 5160, or if they cannot agree on a plan and no local eviction resolution pilot program per
 5 E2SSB 5160 exists.” Dkt. 126-1, at 6.

6 **III. The City’s Restrictions**

7 The City of Seattle also took measures to respond to the COVID-19 crisis, including in
 8 the context of residential tenancies. On March 3, 2020, defendant Durkan proclaimed a civil
 9 emergency. Dkt. 17-6, at 5. On March 16, defendant Durkan placed a temporary moratorium on
 10 residential evictions. *See* Dkt. 124, at 6. That moratorium is set to expire September 30, 2021.
 11 Dkt. 124, at 6. The City’s moratorium forbids eviction unless the eviction is “due to actions by
 12 the tenant constituting an imminent threat to the health or safety of neighbors, the landlord, or the
 13 tenant’s or landlord’s household members.” Dkt. 17-7, at 4. A landlord cannot collect late fees
 14 or other charges due to late payment of rent during the moratorium, either. Dkt. 17-7, at 4.

15 On September 30, 2021, the City Council also passed an ordinance providing a six-month
 16 defense against evictions due to hardship, which will go into effect September 30, 2021. Dkt.
 17 124, at 6. This six month defense applies where eviction would result from nonpayment that
 18 results in having to vacate the housing unit within six months of the end of the mayor’s
 19 moratorium. Dkt. 17-11, at 20. A tenant may invoke the six month defense only by self-
 20 certifying financial hardship preventing payment of rent. Dkt. 17-11, at 20.

21 In addition, on May 11, 2020, the City Council adopted an ordinance governing failure to
 22 pay rent “when due during, or within six months after the termination of, the civil emergency
 23 proclaimed by Mayor Durkan on March 3, 2020[.]” Dkt. 17-12, at 8. Under the repayment plan
 24

1 requirement, a tenant may elect to pay eligible, overdue rent in installments over three to six
 2 months, and failure of a landlord to accept payment under the installment schedule is a defense
 3 to eviction. Dkt. 17-12, at 8–9. Moreover, landlords may not collect late fees, interest, or other
 4 charges during or within one year after the termination of the mayor’s civil emergency. Dkt. 17-
 5 12, at 9.

6 **IV. Plaintiffs**

7 Plaintiffs, who brought suit in this Court in September 2020, are two residential landlords
 8 whose tenants are (or were) not paying rent. *See* Dkts. 95, 97. El Papel, LLC, has provided
 9 evidence that certain tenants owe thousands of dollars of unpaid rent and (for one tenant) against
 10 whom, “[b]ut for the Defendants’ eviction moratoria,” El Papel would initiate eviction
 11 proceedings. Dkt. 95, at 2. The relevant leases, according to plaintiffs, provide for eviction as a
 12 remedy for nonpayment and \$75 monthly late fees. Dkt. 95, at 2. In addition, certain of Berman
 13 2, LLC’s tenants are not paying rent and have not responded to repeated efforts to reach them to
 14 set up a payment plan. Dkt. 97, at 2. At the time plaintiffs moved for summary judgment, the
 15 Berman 2 tenants owed \$16,479 in back rent. Dkt. 97, at 2. Plaintiffs assert that “[b]ut for the
 16 Defendants’ eviction moratoria,” Berman 2 would evict its nonpaying tenants. Dkt. 97, at 2.

17 **V. Current Circumstances**

18 Before delving into the parties’ arguments, the Court would be remiss not to note the
 19 drastic surge in COVID-19 cases currently ongoing and occurring after the parties submitted
 20 their briefing.

21 Three vaccines were authorized for emergency use by the FDA (Dkt. 107, at 6), and as of
 22 September 7, 2021, 67% of people over 11 years old in Washington have been fully vaccinated
 23 against COVID-19. *COVID-19 Data Dashboard*, Wash. State Dep’t of Health (last visited Sept.
 24

10, 2021).⁷ Nevertheless, there has been a dramatic increase in COVID-19 cases since summer 2021, with current case counts near or exceeding those from the previous height of the pandemic. *See id.* (Epidemiologic Curves). This surge is attributable to the spread of a COVID-19 variant (the “Delta variant”), which is highly contagious, more transmissible than prior strains, and now the dominant strain of the virus in Washington State. *See DOH Communications, Delta variant drives sharp increase in COVID-19 cases, hospitalizations*, Wash. State Coronavirus Response (COVID-19) (Aug. 3, 2021).⁸ This surge in cases has led the Governor to re-impose the statewide mask mandate and to require vaccinations for certain groups. *See Inslee announces educator vaccination requirement and statewide indoor mask mandate*, Wash. Governor Jay Inslee (Aug. 18, 2021).⁹

DISCUSSION

I. Legal Standard

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Where there is a complete failure of proof concerning an essential element of the non-moving party’s case on which the nonmoving party has the burden of proof, all other facts are rendered immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). And when presented with a motion for summary judgment, the court shall

⁷ <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard>

⁸ <https://coronavirus.wa.gov/news/delta-variant-drives-sharp-increase-covid-19-cases-hospitalizations>

⁹ <https://www.governor.wa.gov/news-media/inslee-announces-educator-vaccination-requirement-and-statewide-indoor-mask-mandate>

1 review the pleadings and evidence in the light most favorable to the nonmoving party. *Anderson*
 2 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted).

3 Once the moving party has carried its burden under Fed. R. Civ. P. 56, the party opposing
 4 the motion must do more than simply show that there is some metaphysical doubt as to the
 5 material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). The
 6 opposing party cannot rest solely on its pleadings but must produce significant, probative
 7 evidence in the form of affidavits, and/or admissible discovery material that would allow a
 8 reasonable jury to find in his favor. *Id.* at n.11; *Anderson*, 477 U.S. at 249–50. However,
 9 weighing of evidence and drawing legitimate inferences from facts are jury functions, and not
 10 the function of the court. *See United Steel Workers of Am. v. Phelps Dodge Corps.*, 865 F.2d
 11 1539, 1542 (9th Cir. 1989).

12 II. Standing

13 The Court begins by addressing the parties’ arguments concerning standing. *See Steel*
 14 *Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (holding that a federal court cannot
 15 assume standing in order to address the merits).

16 A. CDC Eviction Moratorium

17 According to defendants, because the CDC has imposed an eviction moratorium,
 18 plaintiffs are not able to evict their tenants regardless of the outcome of this suit, so that plaintiffs
 19 lack standing. *See* Dkt. 103, at 11–12; Dkt. 104, at 20. However, on August 26, 2021, the
 20 United States Supreme Court vacated a District Court’s stay of an order vacating the CDC
 21 eviction moratorium, so that the CDC eviction moratorium is no longer in effect. *See Ala. Ass’n*
 22 *of Realtors v. Dep’t of Health & Hum. Servs.*, No. 21A23, 2021 WL 3783142, at *4 (U.S. Aug.
 23 26, 2021) (per curiam); *see also Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Hum. Servs.*,

No. 20-CV-3377 (DLF), 2021 WL 1779282, at *10 (D.D.C. May 5, 2021) (setting aside the CDC moratorium and rejecting arguments that the order should be limited to parties before the Court because “when ‘regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioner is proscribed.’” (quoting *Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)). Thus, defendants’ argument fails.

B. The City’s Repayment Plan Requirement

Next, the City argues that plaintiffs lack standing to challenge the City’s repayment plan requirement because they have failed to make a showing that any of their tenants are electing to use a repayment plan. Dkt. 103, at 12.

As noted, the repayment plan prevents eviction of tenants who are electing to repay rent that became overdue during or within six months after the end of Seattle’s state of emergency. *See* Dkt. 17-12, at 8–9. Plaintiffs appear to concede that their tenants are not currently partially repaying overdue rent under eviction repayment plans. *See* Dkt. 111, at 13. However, as plaintiffs point out, they, too, are currently bound by the City’s ordinance. Specifically, plaintiffs cannot evict their tenants until they issue a notice to terminate tenancy that includes a statement that informs the tenants of their right to pay overdue rent in installments. *See* Dkt. 17-12, at 9. And plaintiffs are unable to impose late fees, interest, or other charges due to “late payment of rent[.]” Dkt. 17-12, at 9. Based on these provisions, plaintiffs have shown that they have standing to challenge the repayment plan requirement.

III. Mootness

The State argues that any challenge to the State’s moratorium is now moot, as that moratorium ended June 30, 2021. Dkt. 104, at 21. Plaintiffs acknowledge that the earlier State

1 moratorium expired but argue that the bridge measure harms plaintiffs in a similar enough
 2 manner that they need not amend their complaint to bring new claims challenging that
 3 moratorium. Dkt. 130, at 5. Focusing solely on the issue of injunctive relief, the Court agrees
 4 that the challenge to the State’s moratorium (even if it encompasses the bridge measure) is moot,
 5 as the bridge moratorium expires by its own terms on September 30, 2021. This will occur
 6 before this Report and Recommendation will be ripe for decision by the District Court. And
 7 plaintiffs make no argument that E2SSB 5160 re-enacts the same provisions that they challenge
 8 in this lawsuit. *See* Dkt. 130.

9 The Court briefly notes that plaintiffs claim that the bridge moratorium does not expire in
 10 September 2021 but continues indefinitely. Dkt. 130, at 4. Contrary to plaintiffs’ claims, the
 11 bridge moratorium has a clear end date of September 30, 2021—the bridge moratorium
 12 repeatedly states as much. Dkt. 131-1, at 4; 6, 7.

13 Even though the claim for injunctive relief against the State must be dismissed as moot,
 14 the Court will nevertheless address the merits of the claims because plaintiffs are claiming
 15 nominal damages and declaratory relief. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802
 16 (2021); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (standing is to be
 17 determined separately for injunctive relief and damages). Should the District Court disagree that
 18 the injunctive relief claims pertinent to the State are moot, it should nevertheless reject those
 19 claims for the same reasons discussed below.

20 **IV. Contracts Clause**

21 **A. State’s Moratorium**

22 Article I, section 10, clause 1 of the U.S. Constitution provides that “No State shall . . .
 23 pass any . . . Law impairing the Obligation of Contracts[.]” Plaintiffs argue that the State’s
 24

1 moratorium violated the Contracts Clause, justifying an award of nominal damages. *See* Dkt. 93,
 2 at 12; Dkt. 130, at 5.

3 “[N]ot all state regulation of contracts gives rise to a Contracts Clause claim. Instead,
 4 ‘[t]he threshold issue is whether the state law has operated as a substantial impairment of a
 5 contractual relationship.’” *LL Liquor, Inc. v. Montana*, 912 F.3d 533, 537 (9th Cir. 2018)
 6 (quoting *Sveen*, 138 S. Ct. at 1821–22). Here, the Court assumes that the State’s restriction
 7 substantially impaired the contractual relationship.¹⁰ *See AALAC*, 2021 WL 3745777, at *6
 8 (“We need not decide whether the eviction moratorium is a substantial impairment of contractual
 9 relations because even assuming it is, given the challenges that COVID-19 presents, the
 10 moratorium’s provisions constitute an ‘appropriate and reasonable way to advance a significant
 11 and legitimate public purpose.’” (Internal citation omitted.)).

12 “If there is a substantial impairment, the inquiry turns to the means and ends of the
 13 legislation.” *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). The Supreme Court “has asked
 14 whether the state law is drawn in an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant
 15 and legitimate public purpose.’” *Id.* (quoting *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light*
 16 *Co.*, 459 U.S. 400, 411–12 (1983)). A court should also look to whether “‘the State, in
 17 justification, [has] a significant and legitimate public purpose behind the regulation, such as the
 18 remedying of a broad and general social or economic problem,’ to guarantee that ‘the State is
 19 exercising its police power, rather than providing a benefit to special interests.’” *RUI One Corp.*
 20 *v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir. 2004) (quoting *Energy Rsrvs. Grp., Inc.*, 459
 21 U.S. at 411–12)).

22
 23
 24 ¹⁰ Therefore, the Court does not address the parties’ arguments regarding whether the
 leases are a substantial impairment to contracts. *E.g.*, Dkt. 93, at 13–18.

Finally, courts must “defer to legislative judgment as to the necessity and reasonableness of a particular measure,” where, as here, neither the state nor city are contracting parties. *Energy Rsrvs. Grp., Inc.*, 459 U.S. at 413 (internal citation and quotation omitted); *see also AALAC*, 2021 WL 3745777, at *5 (characterizing modern Contracts Clause jurisprudence as inquiring into whether the “adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.” (internal citation and quotations omitted)).

The Court turns to plaintiffs’ arguments.

1. Failure to Ensure Compensation

Plaintiffs argue that the State’s moratorium provided no enforcement mechanism to ensure continuing payment—or “just compensation”—for occupation of the premises. Dkt. 93, at 18. Characterized as such, plaintiffs assert that Supreme Court case law holds that such a law violates the Contracts Clause. Dkt. 93, at 18.

For approximately 15 months, the State’s moratorium prohibited landlords from “serving or enforcing, or threatening to serve or enforce” a notice of eviction, similar notice, or judicial eviction for tenancies that expired during the relevant period. *See* Dkt. 106-1, at 46–47, 80. Although this prohibition had certain exceptions, those exceptions were for tenants creating risks or for sale or the landlord’s occupancy of the residence. *See* Dkt. 106-1, at 80; *see also* Dkt. 106 (describing differences between the proclamations). Moreover, landlords could not treat unpaid rent as an enforceable debt or obligation that was then owing or collectable, if the nonpayment was due to COVID-19 and occurred after February 29, 2020. Dkt. 106-1, at 81. The moratorium included an exception from the prohibition against treating unpaid rent as owing or collectable, but only if the landlord could demonstrate that the resident was offered and refused a reasonable

1 repayment plan. *See* Dkt. 106-1, at 81. This moratorium was in effect between March 2020
 2 (Dkt. 17-2, at 4) and June 2021. Dkt. 106-1, at 79.

3 Thus, the State moratorium effectively prevented plaintiffs from evicting tenants for
 4 nonpayment for nearly a year-and-a-half in most situations and from collecting unpaid rent
 5 through other means, unless they first attempted to negotiate a repayment plan. However, as the
 6 State points out, the moratorium did not forgive or cancel unpaid rent—instead, it delayed the
 7 ability to collect unpaid rent or evict tenants for nonpayment. This distinction—between the
 8 *delay* in the ability to obtain compensation for the occupancy of the property and the
 9 *cancellation* of amounts owed to compensate the landlord for the occupancy—owed is
 10 important.

11 Citing a series of Supreme Court cases from as early as 1843, plaintiffs argue that
 12 delaying the right to foreclosure (and by extension, the right to eviction) coupled with failing to
 13 provide for compensation for possession of the property in the meantime is unconstitutional. *See*
 14 Dkt. 93, at 18–19 (citing authorities). But as this Court has already concluded, and as the Ninth
 15 Circuit has recently confirmed, plaintiffs’ interpretation of Supreme Court precedent is flawed:

16 [Plaintiff] correctly observes that the Court in those [cited] Contracts Clause
 17 cases often appears to have referenced in its discussion whether the law provided
 18 for some sort of reasonable rental value to be paid to the property owner during the
 19 moratoria’s interim. In [*Home Building & Loan Association v. Blaisdell*], for
 20 example, the Court upheld a moratorium on foreclosures, at least in part because it
 21 “secure[d] to the mortgagee the rental value of the property” during the emergency
 22 period. 290 U.S. [398, 403 (1934).] The other cases [plaintiff] discusses appear
 23 to have viewed reasonable rent as a relevant consideration as well.

24 But [plaintiff’s] assertion that, as a matter of constitutional law, eviction
 moratoria require fair rental compensation in the interim fails for two main
 reasons. *First*, even in the more Contracts Clause-friendly era in which some of
 these cases were decided, the authorities [plaintiff] cites do not clearly impose
 [plaintiff’s] preferred inflexible rent payment rule. While these cases treated
 reasonable rent as a relevant criterion in the analysis, they do not purport to impose
 such a requirement as a categorical matter. Indeed, even [plaintiff] in its opening

1 brief acknowledges that its desired contemporaneous rent requirement “may not
2 have been elevated to a hard and fast ‘rule’ in every case.”

3 In other words, there is no apparent ironclad constitutional rule that eviction
4 moratoria pass Contracts Clause scrutiny only if rent is paid during the period of
5 the moratoria. Instead, each of the cases [plaintiff] cites turned on its own facts and
6 circumstances. That reasonable rent may have been a relevant consideration in
7 some cases thus does not make it a constitutional floor in all cases. And it does not
8 thereby create a Contracts Clause constitutional baseline in a case involving a
9 public health situation like COVID-19. . . .

10 In claiming that any eviction moratorium is constitutional only if rent is
11 contemporaneously paid, [plaintiff] relies most heavily
12 on *Blaisdell*. But *Blaisdell* shows why [plaintiff’s] attempt to divine a bright-line
13 “reasonable rent” rule is unpersuasive. *Blaisdell* identified several factors that
14 supported the state law’s constitutionality. As the Court later explained, these
15 included that the law contained a declaration of emergency, “protect[ed] a basic
16 societal interest,” was “appropriately tailored,” and imposed “reasonable”
17 conditions “limited to the duration of the emergency.” *Allied Structural [Steel Co.*
18 *v. Spannaus*], 438 U.S. [234, 242 (1978)]; *see also Blaisdell*, 290 U.S. at 444–47[.]
19 Nothing in *Blaisdell* suggests that a “reasonable rent” requirement was dispositive.
20 Indeed, *Blaisdell* specifically rejected the notion that Contracts Clause analysis
21 should proceed with a “literal exactness like a mathematical formula.” 290 U.S. at
22 428[.]. Instead, “[e]very case must be determined upon its own
23 circumstances.” *Id.* at 430[.] (quotations omitted).

24 *AALAC*, 2021 WL 3745777, at *7–8; *see also* Dkt. 63, at 14 (“*Blaisdell* and subsequent cases
make clear that there is no precise formula or factor-based test to be applied in every case but
that the overarching consideration must be the reasonableness of the impairment based on the
facts of the case.”).

Here, too (and as the Court has previously ruled), *Blaisdell* undermines, rather than
supports, plaintiffs’ claims. The State moratorium was analogous to *Blaisdell* in material
respects. As explained above, the State moratorium was temporary in operation, it was tied to
the duration of a civil emergency and a related economic crisis, and it was addressed toward
undisputedly legitimate societal goals. This is also unlike plaintiffs’ cited authority of *W.B.*
Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935), where a law that eased restrictions on

1 | mortgagors in a variety of ways effectively took “from the mortgage the quality of an acceptable
2 | investment for a rationale investor.” *Id.* at 61.

3 | Although plaintiffs make much of the provision in the *Blaisdell* legislation providing for
4 | compensation to the property owner in the meantime, as noted, it was the totality of the
5 | circumstances and not a single factor that led the Supreme Court to uphold the law. *See also*
6 | *Allied Structural Steel*, 438 U.S. at 242. Moreover, even if the Court read the case law cited in
7 | plaintiffs’ briefing as requiring compensation to the landlord for the period of occupancy, none
8 | of the eviction restrictions forgave or waived the obligation of paying rent. The State
9 | moratorium never *cancelled* overdue rent obligations but *delayed* the ability to collect unpaid
10 | rent (due to COVID-19) if the landlord could not demonstrate attempts to negotiate a reasonable
11 | repayment plan and prevented eviction during the 15-month period in most circumstances. This
12 | is similar to the *Blaisdell* legislation’s provision for mortgagors to pay the rental value of the
13 | premises in a manner set by a court. *See* 290 U.S. at 416–17. Plaintiffs make much of the
14 | “flexible” nature of the compensation provision in *Blaisdell*, but the State’s restriction was also
15 | flexible—landlords could treat unpaid rent as immediately due and payable if the tenant failed to
16 | adhere to a reasonable repayment plan or if the non-payment was not “as a result of the COVID-
17 | 19 outbreak.” *See* Dkt. 106-1, at 47.

18 | **2. Connection between the Moratorium’s Purpose and Means**

19 | Plaintiffs next challenge whether the eviction moratorium was sufficiently “tailored to
20 | the emergency that it was designed to meet.” Dkt. 93, at 20 (quoting *Allied Structural Steel Co.*,
21 | 438 U.S. at 242).

22 | The Court observes that because the government is not a party to the contract being
23 | impaired, “courts properly defer to legislative judgment as to the necessity and reasonableness
24 |

1 of a particular measure.” *AALAC*, 2021 WL 3745777, at *5 (quoting *Energy Reserves*, 459 U.S.
 2 at 413). The Supreme Court has not required a “precise[]” or perfect fit between the legislation
 3 and the objective but instead that the relief be “appropriately tailored to the emergency that it
 4 was designed to meet.” *See* Dkt. 93, at 13; *Allied Structural Steel Co.*, 438 U.S. at 242.

5 Plaintiffs argue that although the State’s moratorium was meant to mitigate the effects of
 6 imminent unemployment caused by shutdowns and a resulting eviction crisis caused by inability
 7 to pay rent, it unreasonably extended to “all tenants, regardless of financial circumstance or
 8 likelihood of finding alternative housing.” Dkt. 93, at 21. But as the Court previously found, the
 9 State had an “undisputedly legitimate purpose[]” in “avoid[ing] the transmission of the disease
 10 by reducing housing instability[.]” Dkt. 63, at 20; *see also* Dkt. 107, at 2 (State’s evidence that
 11 “[i]n the absence of the moratorium, renters evicted from their homes would, at minimum,
 12 increase their mobility to find a new home to rent, thus increasing their in-person contacts with
 13 those outside their household” and would “likely move in” to “crowded shared living
 14 environments[.]”); *accord AALAC*, 2021 WL 3745777, at *6 (“The City fairly ties the
 15 moratorium to its stated goal of preventing displacement from homes, which the City reasonably
 16 explains can exacerbate the public health-related problems stemming from the COVID-19
 17 pandemic.”). The State has provided statistic modelling estimating that mass evictions would
 18 result in Washington State sustaining up to 59,008 more eviction-attributable COVID-19 cases,
 19 up to 5,623 more hospitalizations, and up to 621 more deaths. *See* Dkt. 108-1, at 64. While this
 20 conclusion may be implausibly precise, it is nevertheless reasonable to conclude that a
 21 significant increase in hospitalizations and deaths would likely occur if tenants had been evicted
 22 from their homes during a massive pandemic such as the one we are still confronting.

Moreover, in support of their summary judgment motion, the State has come forward with evidence that the State considered but declined to incorporate a hardship requirement:

In many cases, tenants in genuine economic distress due to the pandemic are unable to provide adequate proof of their distress. Many tenants have informal employment or non-traditional sources of income. For these tenants, proving distress is not as simple as submitting a copy of a termination letter from an employer. And even if a tenant did not lose their job, they could be facing pandemic-related economic distress anyway, such as the burden of caring for family members who lost their jobs or are unable to provide for themselves. Not all tenants in need of protection are able to submit a declaration of hardship, much less provide proof of their circumstances. In light of that, we considered it best to not put the burden of proof on tenants, but to impose a simple moratorium on evictions with certain exceptions. . . .

We also considered that housing court is often crowded, and it would be difficult for tenants facing eviction to defend themselves without endangering their health. If the eviction moratorium were to expire, be lifted, or otherwise end, mass unlawful detainer filings would flood the state courts, which are experiencing record backlogs of stayed civil, criminal, juvenile, child welfare, and other proceedings. . . .

Dkt. 105, at 9–10.

In response, plaintiffs argue that the State is “quite capable of parsing messy facts” and adjusting evidentiary requirements for a hardship exception. Dkt. 111, at 24. This is not responsive to the State’s secondary rationale that forcing tenants to defend themselves in eviction court would likely endanger their health and the overall goal of avoiding housing instability regardless of the availability of alternative housing. Moreover, it is not the function of the Court to invalidate government action because it was not, in the Court’s view, a perfect match to the Government’s objective. The Court is only charged with determining if the state’s action was “adequately tailored” to meet the emergency, as required by *Allied Structural Steel*. It is not required, as essentially argued by plaintiffs, to determine the “least restrictive means” of achieving that goal. *See* Dkt. 111, at 24 (“If other less severe methods of achieving the Defendants’ interests exist, then the eviction bans are not adequately ‘tailored to the emergency. .

1 . . .”); *accord Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 386 n.10 (D. Mass. 2020) (“In any
 2 event, the court must determine whether there was a rational basis for the Moratorium when it
 3 was enacted, not whether it was necessary because there was no less burdensome way to address
 4 the impact of evictions during the pandemic.”).

5 Plaintiffs also assert that the State’s restriction on treating unpaid rent as an immediately
 6 enforceable debt lacks a connection to preventing disease transmission and homelessness. Dkt.
 7 93, at 22. But plaintiffs do not show any reason to depart from the Court’s previous finding
 8 that—

9 this provision was added specifically based on input from property owners and in
 10 order to strike a balance between alleviating stress on tenants and providing an
 11 avenue for lessors to be made whole. . . . The State’s balance of the interests of
 12 tenants and lessors by requiring rejection of a reasonable repayment plan before
 treating unpaid rent as collectible is an appropriate and reasonable measure,
 particularly where it is tied directly to nonpayment that is caused by the COVID-
 19 outbreak.

13 Dkt. 63, at 21–22 (internal quotation marks and citation omitted); *compare Blaisdell*, 290 U.S. at
 14 446 (“It does not matter that there are, or may be, individual cases of another aspect. The
 15 Legislature was entitled to deal with the general or typical situation. The relief afforded by the
 16 statute has regard to the interest of mortgagees as well as to the interest of mortgagors. The
 17 legislation seeks to prevent the impending ruin of both by a considerate measure of relief.”).

18 Plaintiffs further argue that a number of more moderate means could have accomplished
 19 the same ends. *See* Dkt. 93, at 23–24. They propose managing or capping eviction filings,
 20 providing compensation to landlords, commandeering housing, and providing hygiene kits to
 21 homeless persons. Most of these proposals are, again, nonresponsive to alleviating disease
 22 transmission caused by housing displacement and avoiding tenants having to go to court.
 23 Moreover, the State has come forward with evidence that although it considered other
 24

1 alternatives, “[a] mere cap on evictions would be too difficult to implement across the state and
 2 through various institutions, and it would not be effective in halting a rise in evictions.” Dkt.
 3 105, at 8. And the State points out that it has, essentially, managed evictions by allowing only
 4 certain evictions—that is, those for sale or occupancy of the property by the landlord or where
 5 tenants pose a risk to others.

6 As for the proposal to compensate landlords instead of restricting evictions, the State has
 7 also come forward with evidence that although funding has, in fact, been made available, “those
 8 funds have been inadequate to avert the wave of evictions that would result in the absence of the
 9 moratorium.” Dkt. 105, at 6–7. The State provides evidence of Eviction Rental Assistance
 10 Program funding (over \$100 million distributed by the State to local organizations), Emergency
 11 Solutions Grants (about \$120 million spent in the State in 2020), local tax revenues for certain
 12 cities, and over \$400 million for Washington State renters in 2021 under the American Rescue
 13 Plan. Dkt. 105, at 7. But, according to the State, all this covered “only a fraction of the
 14 anticipated need for rental assistance, which is in the billions of dollars.” Dkt. 105, at 7. The
 15 State also points out that it has continued to appropriate and propose funds for rental assistance
 16 programs, including working with the State legislature to transition from eviction restrictions to
 17 rental assistance and other tenancy supports. Dkt. 105, at 7.

18 As the Ninth Circuit also discussed in *AALAC*, these efforts support the constitutionality
 19 of the eviction restriction by showing that the State has used the restrictions coupled with other
 20 measures as part of a broad remedial framework:

21 Further weakening [the plaintiff’s] challenge is the fact that the eviction
 22 moratorium is but one aspect of a broader remedial framework applicable to
 23 landlords during the pandemic. In response to [the plaintiff’s] concerns, [the City]
 fairly argue[s] that the City’s creation of an Emergency Rental Assistance Program
 supports the eviction moratorium’s reasonableness. . . .

24

1 . . . Although the interaction between these various programs is a matter of
 2 some complexity, the availability of such relief, while not dispositive, remains
 3 relevant in assessing the overall reasonableness of the City's actions. *See Energy*
Reserves, 459 U.S. at 418[.] That other government programs provide some relief
 to landlords thus further undermines [plaintiff's] Contracts Clause challenge.

4 *AALAC*, 2021 WL 3745777, at *8.

5 Plaintiffs assert that purposes such as avoiding disease transmission lack legitimacy
 6 where circumstances have improved over the last six months, since the Order denying the motion
 7 for preliminary injunction. *See* Dkt. 111, at 21–22. But, as discussed in the background section
 8 of this Report and Recommendation, the picture is not as rosy as plaintiffs paint it. A State
 9 epidemiologist opines that “while mitigation efforts in Washington State helped reduce the
 10 spread of COVID-19 in mid-March through April 2021, cases have started to rebound” and that
 11 continued mitigation efforts (including the eviction restrictions) have been crucial to avoiding
 12 overwhelming hospitals and attempting to control the public health emergency. *See* Dkt. 107, at
 13 18; *see also* Dkt. 107, at 23–24. Plaintiffs fail to provide evidence to contradict the State's
 14 evidence that restrictions remained necessary throughout the relevant time period to control the
 15 spread of COVID-19, instead simply citing reduced cases and increased vaccination results in
 16 May 2021. *See* Dkt. 111, at 22; *but see* Dkt. 109-1, at 131 (State's materials stating that as of
 17 May 2021, herd immunity was unlikely until at least 70% of the population was fully
 18 vaccinated).

19 For all these reasons, the Court finds that plaintiffs have failed to raise a genuine issue of
 20 material fact that the state law was not drawn in an appropriate and reasonable way to advance a
 21 significant and legitimate public purpose. The State's moratorium passes muster under the
 22 Contracts Clause.

23 **B. City Restrictions**

1 Plaintiffs also assert that the City’s restrictions violate the Contracts Clause. *See* Dkt. 93,
2 at 22. They challenge the Mayor’s eviction moratorium, currently set to expire September 30,
3 2021. *See* Dkt. 124, at 6. Although it appears that the City moratorium will not be renewed
4 (“the Emergency Moratorium on Residential Evictions will sunset and Ordinance 126075, which
5 provides a defense against evictions due to hardship from COVID-19 for six months, goes into
6 effect” (Dkt. 124, at 6)), the Court observes that plaintiffs also seek nominal damages related to
7 their claim against the City. *See* Dkt. 80, at 18.

8 Similar to the State moratorium, the City moratorium forbids eviction unless the tenant
9 poses a risk to others—although the City moratorium does not include an exception for
10 occupancy or sale of the property by the landlord. *See* Dkt. 17-7, at 4. For the same reasons that
11 the Court finds that the State moratorium does not violate the Contracts Clause, the Court finds
12 that the City moratorium is constitutional. *See supra*, Discussion part III(A).

13 Separately, plaintiffs challenge the City’s six-month defense against eviction, which will
14 go into effect September 30, 2021. Dkt. 124, at 6. Essentially, this defense applies to evictions
15 within six months of the end of the City eviction moratorium and where the eviction is for
16 unpaid rent during the period including that covered by the City’s eviction moratorium or for a
17 habitual failure to pay rent “resulting in four or more pay-or-vacate notices in a 12-month
18 period.” Dkt. 17-11, at 20. A tenant may invoke the defense only by self-certifying financial
19 hardship preventing payment of rent. Dkt. 17-11, at 20.

20 Plaintiffs argue that this defense “unnecessarily extends six months beyond the
21 termination of the Mayor’s emergency order” so that by the time the defense is in effect, “the
22 City’s interest in taking such measures will have come to an end.” Dkt. 93, at 22. But plaintiffs
23 previously raised this argument in their preliminary injunction motion, and the Court found that
24

1 the City had supported this six-month extension by explaining that “economic impacts from the
2 COVID-19 emergency are likely to last much longer than the civil emergency itself[.]” Dkt. 63,
3 at 21 (internal citation and quotation marks omitted).

4 So too, on summary judgment: defendants have come forward with evidence that the
5 pandemic has exacerbated Washington’s pre-existing rental issues and that—despite over a year
6 of relief efforts—loss of income, inability to pay rent, and risk of eviction continue to plague
7 tenants—as the City predicted when it enacted these measures. Even before the pandemic, there
8 was a “significant lack of affordable housing across the state” (Dkt. 105, at 2) and “46% of
9 Washington households were rent burdened (contributing more than 30% of [their] income to
10 rent) with about half of those households contributing more than 50% of their income to rent.”
11 Dkt. 100-5, at 3. In April 2020, as the pandemic took hold, Washington State unemployment
12 reached its highest rate in decades. *See* Dkt. 25-1, at 4.

13 A year later, Washington monthly unemployment claims continued to outpace those from
14 the prior year (Dkt. 105, at 3; Dkt. 109-1) and nearly 11% of Washington households were
15 behind on rent (Dkt. 100-6, at 2, 4). Surveys indicated that job loss and hours reductions had
16 declined some since the beginning of the pandemic, yet renter financial distress remained high.
17 Dkt. 115-1, at 24; *see also* Dkt. 106-1, at 96 (Washington legislative findings that the COVID-19
18 pandemic had caused a “economic downturn throughout Washington state” that
19 disproportionately affected low and moderate-income workers). According to one source, as of
20 March 2021, the country is facing a “rental crisis, with over 8 million rental households behind
21 on their rent.” Dkt. 115-3, at 4; *see also* Dkt. 106, at 5 (“over 300,000 renters need or will need
22 assistance by May 2021”). The King County unemployment rate in March 2021 was 5.4%—
23 well above the 3.0% rate two years prior—the average rent debt per household was \$4,903, and
24

1 nearly 45,000 households were behind on rent. Dkt. 100-7, at 2–3; Dkt. 100-11, at 2. The CDC
 2 has stated that when eviction moratoria lift and based on March 2021 reports of tenants behind
 3 on rent, there will be a “wave of evictions” on a scale “unprecedented in modern times.” Dkt.
 4 100-2, at 7. The City has also provided evidence that an eviction crisis would result in
 5 homelessness and an increased risk of disease transmission. *See* Dkt. 25-4, at 6 (finding that
 6 most evicted persons in Seattle became homeless, many moved in with family or friends, and
 7 only 12.5% found another apartment or home to move into); Dkt. 25-5, at 2, 4 (CDC findings
 8 that homelessness increases the likelihood of COVID-19 transmission and severity of disease
 9 and that eviction moratoria assist in reducing the community spread of COVID-19).

10 Underpinning the City’s defense is the rationale that the “economic impacts from the
 11 COVID-19 emergency are likely to last much longer than the civil emergency itself” (Dkt. 17-
 12 11, at 3)—a rationale borne out by the undisputed evidence cited above. *But see* Dkt. 93, at 22
 13 (plaintiffs’ brief, claiming that there is no need to extend the eviction ban because “the City’s
 14 interest in taking such measures will have come to an end”). Allowing defaulted tenants
 15 additional time to repay amounts due is adequately tailored to the City’s goal of preventing
 16 evictions and homelessness, as well as corresponding potential to cause a spike in the COVID-19
 17 pandemic. And for similar reasons as discussed above in the context of the eviction moratoria,
 18 this defense does not violate the Contracts Clause, either.

19 Plaintiffs take issue with the self-certification of hardship, which they state is “left
 20 undefined in the ordinance, making it difficult for landlords to challenge a tenant’s certification.”
 21 Dkt. 93, at 22.¹¹ This argument appears to be entirely speculative, as no landlord complains in a
 22

23 ¹¹ The Supreme Court recently temporarily enjoined a New York law pertaining to
 24 evictions during COVID-19. *Chrysafis v. Marks*, No. 21A8, 2021 WL 3560766, at *1 (U.S.
 Aug. 12, 2021). “If a tenant self-certifies financial hardship” due to COVID-19, the law

1 declaration that it has been unable to challenge or realistically suspect it will not be able to
2 challenge whether a tenant is truly in financial hardship. In any event, “difficulty” challenging a
3 hardship certification does not transform the six-month defense into a violation of the Contracts
4 Clause.

5 Similarly, plaintiffs’ challenge to the City’s repayment plan requirement also fails. The
6 City allows tenants to elect to pay eligible, overdue rent installments over a period of three to six
7 months, with failure of the landlord to accept such payment being a defense to eviction. Dkt. 17-
8 12, at 8–9. Landlords also cannot collect late fees or interest on unpaid rent accrued during or
9 six months after the civil emergency. Dkt. 17-12, at 8.

10 Again, and as the Court has also previously found, it is eminently reasonable for the City
11 to attempt to strike a balance between the landlords’ entitlement to unpaid rent and the likelihood
12 of a wave of evictions and homelessness by providing for delayed repayment of unpaid rent
13 under a mandated schedule. This provision does not violate the Contracts Clause, either.
14 Indeed, contrary to plaintiffs’ claims that the City’s restrictions collectively “creat[e] an
15 incentive for renters not to pay and take advantage of the mandated repayment plan” (Dkt. 93, at
16 20), the City is attempting to facilitate the repayment of delinquent rent by encouraging renters to
17 repay under a mandatory repayment plan.

18 In sum, plaintiffs fail to come forward with evidence from which a factfinder could find
19 in their favor on the Contracts Clause claims or to show that they are entitled to judgment as a
20

21 “generally precludes a landlord from contesting that certification and denies the landlord a
22 hearing.” *Id.* The Supreme Court concluded that “[t]his scheme violates the Court’s
23 longstanding teaching that ordinarily, ‘no man can be a judge in his own case’ consistent with
24 the Due Process Clause.” *Id.* (internal citation omitted). Here, no due process claim is before
the Court. And, in any event, there is no evidence that the ordinance implementing the six month
defense prevents a landlord from contesting or having a hearing regarding hardship rather than
simply leaving the definition and method of establishing of hardship open.

1 matter of law. Defendants are entitled to summary judgment dismissal of the Contracts Clause
2 claims, and the Court turns to the Takings Clause arguments.

3 **V. Takings Clause**

4 The Fifth Amendment’s Takings Clause prohibits the government from taking private
5 property unless it is for a “public use” and “just compensation” is paid to the owner. U.S. Const.
6 amend. V. A “physical taking,” occurs when the government “authorizes a physical occupation
7 of property.” *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). Plaintiffs argue that the
8 eviction restrictions constitute a physical taking “by compelling landlords to house tenants who
9 no longer satisfy lease terms, including tenants whose leases have already expired.” Dkt. 93, at
10 26.

11 As the Court previously concluded, generally, injunctive relief is barred for Takings
12 Clause claims. *See* Dkt. 63, at 23–25. However, because plaintiffs also bring claims for
13 declaratory relief and nominal damages, the Court now addresses the merits of the Takings
14 Clause arguments.

15 “The government effects a physical taking only where it *requires* the landowner to
16 submit to the physical occupation of his land.” *Yee*, 503 U.S. at 527; *see also FCC v. Fla. Power*
17 *Corp.*, 480 U.S. 245, 252 (1987) (“This element of required acquiescence is at the heart of the
18 concept of occupation.”). *Yee* supplies the rule that is dispositive of the physical taking
19 arguments in this matter.

20 *Yee* holds that a government can restrict the circumstances in which a tenant may be
21 evicted without committing a physical taking. In *Yee*, mobile home park owners challenged a
22 combination of municipal ordinance and state statute that effectively limited the bases upon
23 which the owners could evict their tenants. *See* 503 U.S. at 524–25. The owners argued that this
24

1 amounted to a physical taking because the right to occupancy of their land had been restricted.

2 But, the Supreme Court disagreed:

3 [The park owners] voluntarily rented their land to mobile homeowners. . . . Put
4 bluntly, no government has required any physical invasion of petitioners' property.
[The] tenants were invited by [the owners], not forced upon them by the
government. . . .

5 . . .
6 On their face, the state and local laws at issue here merely regulate [the
owners'] *use* of their land by regulating the relationship between landlord and
7 tenant. This Court has consistently affirmed that States have broad power to
regulate housing conditions in general and the landlord-tenant relationship in
8 particular without paying compensation for all economic injuries that such
regulation entails.

9 *Id.* at 528–29 (internal citations and quotation marks omitted).

10 Here, too, the government has not required a physical invasion of plaintiffs' property.
11 Instead, plaintiffs have voluntarily rented their land to residential tenants and temporarily lost the
12 ability to evict tenants in certain situations during the COVID-19 crisis and for six months after
13 September 30, 2021. Contrary to plaintiffs' arguments, none of the restrictions are permanent.
14 Plaintiffs retained the ability to sue their tenants for unpaid rent due to COVID-19 under the
15 State moratorium, except where the resident had not been offered or was complying with a
16 repayment plan. *See* Dkt. 106-1, at 47. The City allows tenants to take advantage of a
17 repayment plan, but neither the City nor the State has forgiven or cancelled unpaid rent.

18 Notably, other District Courts faced with similar challenges have reached the same
19 conclusion—finding that various eviction restrictions related to the COVID-19 pandemic did not
20 violate the Takings Clause. *See Heights Apartments, LLC v. Walz*, 510 F. Supp. 3d 789, 812 (D.
21 Minn. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); *Auracle Homes,*
22 *LLC v. Lamont*, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020); *Elmsford Apartment Assocs.,*
23 *LLC v. Cuomo*, 469 F. Supp. 3d 148, 162–64 (S.D.N.Y. 2020).

1 Plaintiffs argue that *Yee* is distinguishable because here, they must allow tenants who
2 would otherwise be evicted to remain. *See* Dkt. 111, at 32. This is not a persuasive reason to
3 depart from *Yee*: the state law at issue in *Yee* also only permitted eviction in a narrow
4 circumstance—where the park owner wanted to change the use of the land—and required that
5 the owner give six to twelve months’ notice. *Yee*, 503 U.S. at 528. Under the relevant eviction
6 restrictions here, landlords could still evict tenants for creating risks to others or their property or
7 for personal occupation or sale of the property (State moratorium); for tenants’ actions
8 threatening others’ or their own health or safety (City moratorium) or where the eviction was for
9 something other than financial hardship caused by COVID-19 (six month defense).

10 In supplemental briefing before this Court, plaintiffs argue that a recently decided
11 Takings Clause case, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), supports their
12 physical takings claim. *See* Dkt. 130, at 9. However, this case involves materially different
13 circumstances: the landowners in *Cedar Point Nursery* were forced to allow unionizing activity
14 by third persons for a specified amount of time (141 S. Ct. at 2069), whereas here, the landlords
15 invited the renters to their units when they formed rental agreements and remain free to evict
16 tenants under the circumstances enumerated above.

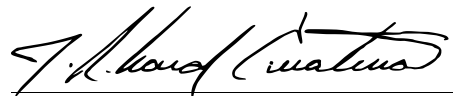
17 Plaintiffs do not bring an alternative claim for a regulatory taking, so that based on the
18 analysis above, their Takings Clause claims should be dismissed with prejudice.

19 CONCLUSION

20 The undersigned recommends that defendants’ motions for summary judgment (Dkts.
21 103, 104, 110) be granted, that plaintiffs’ motion for summary judgment (Dkt. 93) be denied, that
22 all claims be dismissed with prejudice, and that the case be closed.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
2 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
3 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*
4 review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a waiver of those
5 objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v.*
6 *Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit
7 imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **October 1,**
8 **2021**, as noted in the caption.

9 Dated this 15th day of September, 2021.

10 

11 J. Richard Creatura
12 Chief United States Magistrate Judge
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